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IN THE

Supreme Court of the United States

OCTOBER TERM, [redacted] 1970

No. [redacted] 172

JOSEPH LEE NOLAN and SAMUEL F. COMEAUX,
Petitioners,

versus

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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IN THE
SUPREME COURT OF THE UNITED STATES
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OPINION BELOW

The opinion of the Court of Appeals is reported in F.2d., and is included herein as Appendix A.

JURISDICTION

The judgment of the United States Court of Appeals for the Fifth Circuit was entered December 29, 1969, No. 27241. Appendix A. The petition for rehearing was denied April 20, 1970. Appendix B.

The Jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether the Federal Rules of Criminal Procedure, and the established jurisprudence on the constitutional concepts of a fair trial require pre-trial discovery of some ninety hours of illegal wiretap and electronic eavesdropping evidence acquired by government agencies.

STATUTE INVOLVED

Rule 16 of the Federal Rules of Criminal Procedure provides:

> "(a) *Defendant's Statements; Reports of Examinations and Tests; Defendant's Grand Jury Testimony.* Upon motion of a defendant the court may order the attorney for the government to permit the defendant to inspect and copy or photograph any relevant (1) written or recorded statements or confessions made by the defendant, or copies thereof, within the possession, custody or control of the government, the existence of which is known, or by the exertise of due diligence may become known, to the attorney for the government, (2) results or reports of physical or mental examinations, and of scientific tests or experiments made in connection with the particular case, or copies thereof, within the possession, custody or control of the government, the existence of which is known, or by the exercise of due diligence may become known, to the attorney for the government, and (3) recorded

testimony of the defendant before a grand jury."

STATEMENT OF THE CASE

From the Fifth Circuit opinion of Judge Carswell, Appendix A, the petitioners adopt the following concise statement of the case.

> "Appellants Nolan and Comeaux, along with Samuel Graziano, were jointly indicted on three counts for violations of Title 18, United States Code, Section 224, pertaining to bribery of sporting events. Graziano pleaded guilty to all three counts and was sentenced to one year's imprisonment on each count, which terms were to run concurrently. Nolan and Comeaux pleaded not guilty and a jury trial followed. Both were found guilty by the jury and were respectively sentenced to four and three years for each count, such terms to run concurrently. Nolan was also fined $10,000.00.
>
> Before their trial, appellants filed motions at three different times seeking discovery and inspection of all documents or tangible objects in the hands of the government, including any electronic or mechanical recordings. One such motion was withdrawn by appellants because of the government's assertion that it had no unlawfully obtained evidence in connection with this case. The other two motions were denied, the trial judge reserving to appellants the right

to have a hearing on the admissibility of certain evidence after the trial."

After trial and conviction, petitioners filed an additional motion for discovery and inspection (46). This motion was granted and forty-two tapes of recorded wiretap and electronic eavesdropping evidence were made available to the accused. The denial of this discovery until after trial and conviction is the essence of the error that this petition would note.[1]

Petitioners acknowledge keen disappointment in their failure in the post-trial attempt to prove the taint of the wiretap or the bug but here acknowledges the wisdom of Alderman (Alderman v. United States, 390 U.S. 136) which assigns the responsibility of determining the "effect" of illegal wiretap and electronic eavesdropping evidence to the district court adversary hearing procedures.

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[1]Counsel for petitioners also questions whether or not the government produced all of the wiretap and electronic eavesdrop evidence. In a desperate attempt to obtain pre-trial discovery, petitioner Nolan in complete detail itemized four instances when the Federal Bureau of Investigation, the Internal Revenue Service, and the Pacific Telephone and Telegraph Company had illegally wiretapped or eavesdropped on HIS conversations. Therefore, this anomaly arose:

Under the March 10, 1969, Alderman decision, he had "'standing" to invoke the exclusionary rule of Weeks vs. United States, 232 U.S. 383 and Mapp v. Ohio, 367 U.S. 643, to suppress the evidence obtained by the "uninvited ear" but he had no way to know the extent or full content (ninety hours) of the evidence he had the right to exclude. And; petitioners further suggest that the evidence withheld from them may have materially assisted them in trial preparation.

Perhaps the error complained of can best be demonstrated by hastily adding that the post-trial hearing on the "effect" of illegal wiretap and electronic eavesdropping evidence is subject to criticism, but is not the error on which petitioners predicate this application.

Criticism might follow from the fact that the court below found district court authority for the post-trial hearing in the Birrell matter, (United States v. Birrell, 269 F. Supp. 716 (S.D. N.Y. 1967) which pre-dates Alderman. It seems that Alderman added fourth amendment constitutional dimensions to the "overheard word" and that if this fourth amendment dimension is conceded then all the sanctity of the exclusionary rule therein included would apply to the "overheard word". Certainly a rule to exclude illegally seized evidence only after trial and conviction does not seem to be the most expeditious legal procedure.

Alderman, petitioners believe, not only guarantees the individuals right to be secure from illegal searches and seizures of his "overheard word", but also secures for this individual the broadest concept of a fair trial.

Certainly petitioners do not believe that Alderman ever intended to take away any of the petitioners right of discovery.

Petitioners believe that law and logic declares the sequence of discovery and suppression, rather than sup-

pression and discovery[2]. The right to suppress illegally obtained evidence is constitutionally guaranteed, and it is this very right that petitioners were denied when they were denied authorized procedures to discover whether such illegal evidence even existed.

We need only to view the succession since Jencks (Jencks v. United States, 77 S.Ct. 1007, 353 U.S. 671, 1 L ed 2d 1103) to see the fair trial qualities of the sixth amendment reaffirmed and extended even beyond the discovery originally authorized in the Jencks case. 18 U.S.C. 3500, codified the fair trial concept of discovery originally stated in the Jencks case. The Dennis case (Dennis v. United States, 384 U.S. 855, 86 S.Ct., 1840, 16 L ed 2d. 973, (1966) certainly can be categorized as a liberalization of the law of discovery. And, finally in the Alderman case (Alderman v. United States, 89 S.Ct. 961 (1969), it was decreed that even the interests of national security could not preclude the discovery of an illegal wiretap — or illegal electronic eavesdrop.

The simple conclusion is that the petitioners voices were recorded endlessly (ninety hours) and that the government had possession of these recordings — or they could have had them by the exercise of due diligence.

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[2]On May 23, 1968, four days before the commencement of trial, and after all motions for discovery and inspection of wiretap and electronic eavesdropping evidence had been denied, counsel for petitioners filed a motion to suppress all evidence produced "directly" or "indirectly" or "derivative" of any electronic eavesdropping or wiretap. This desperation move to protect the record resulted in an order granting the suppression of all evidence obtained "as a direct result of illegal wiretaps or electronic eavesdropping". (31)

These statements of the accused should under our basic constitutional concepts of fair trial, have been made available to him prior to trial, and petitioners firmly believe that this is constitutionally guaranteed regardless of whether the voice records were legally or illegally obtained.

Petitioners believe that fundamental error exists in the record of this trial, and that it exists because of a deliberate confusion of the right to suppress and right to discover. Discovery is no more or less than a time tested device designed to assure a fair trial. Discovery has for its objective the elimination of "gamemanship" from the criminal trial. Justice Douglas in commenting on the new and enlarged federal rules of discovery said, "A civilized society ought not to tolerate the conduct of a criminal prosecution as a game." 15 L ed 2d XXXII.

Petitioners have classified discovery as a "right" even though Rule 16 states that the court "may" order discovery, this presumptiveness petitioners believe is justified by the ever growing concept of the fair trial. Perhaps the outstanding development of that concept is to be found in Giles v. Maryland, 386 U.S. 66, 87 S.Ct. 793, 17 L ed 2d 906 (1967).

Certainly the right of an accused to discover, copy or inspect HIS OWN STATEMENTS appears to have a constitutional basis. It is to be remembered that Rule 16 states that the court may permit the defendant:

"to inspect and copy or photograph any relevant (1) written or recorded statements or confes-

> sions made by the defendant, or copies thereof, within the possession, custody or control of the government, the existence of which is known, or by the exercise of due diligence may become known, to the attorney for the government . . ."

Now that Alderman has given the spoken word constitutional protection against unlawful seizure it seems proper that the accused be allowed to discover which of his own statements the government possesses, or which of his own statements the government could know "by the exercise of due diligence",

In one of the several motions for discovery and inspection (17) there is a most significant paragraph. Therein is the following language:

> "The exercise of due diligence, movers submit, might have produced the following evidence of wiretapping and electronic eavesdropping, and thereon noted the voice of the defendant Nolan. Regardless, the accused, Nolan, now swears his private conversations were clandestinely intercepted and recorded by the Federal Bureau of Investigation and the Internal Revenue Service in the following instances . . ."

CONCLUSION

A conflict possibly, or more possibly a misunderstanding of the two basic constitutional principles — the exclusionary rule and the right of discovery — has lead to obvious error and a miscarriage of justice.

Both discovery and exclusion are fundamental rights of an individual who must face the strongest of governments in a criminal prosecution. Neither right should be denied to him, and a misunderstanding or conflict of the two rights mght be destructive of both. It is therefore respectfully suggested that a resolution of this matter at this high level is in the best interests of our system of justice.

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PROOF OF SERVICE

I, GUY JOHNSON, attorney for petitioners and a member of the Bar of the Supreme Court of the United States, hereby certify that on this day I served copies of the foregoing petition for Writ of Certiorari upon the Solicitor General, Department of Justice, Washington 25, D.C., and the United States Attorney for the Eastern District of Louisiana, 500 St. Louis Street, New Orleans, Louisiana 70130.

New Orleans, Louisiana, May ____, 1970.

GUY JOHNSON

APPENDIX A

IN THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 27241

UNITED STATES OF AMERICA,
Plaintiff-Appellee,
versus

JOSEPH LEE NOLAN a/k/a "JO JO" NOLAN, and SAMUEL F. COMEAUX a/k/a "FREDDIE" COMEAUX,
Defendants-Appellants.

Appeal from the United States District Court for the Eastern District of Louisiana

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(December 29, 1969)

Before GOLDBERG, DYER and CARSWELL, Circuit Judges.

CARSWELL, Circuit Judge: On this appeal, appellants, Nolan and Comeaux, contend that they were deprived of a fair trial because the trial judge denied their requests for discovery of extensive wiretap and electronic eavesdrop material until after trial; because

the government failed to sustain its burden of establishing lack of taint; and because the trial judge failed to give instructions to the jury on the defense of entrapment. Having carefully considered each of appellants' contentions, we find no reversible error and affirm the conviction below.

Appellants Nolan and Comeaux, along with Samuel Graziano, were jointly indicted on three counts for violations of Title 18, United States Code, Section 224, pertaining to bribery of sporting events. Graziano pleaded guilty to all three counts and was sentenced to one year's imprisonment on each count, which terms were to run concurrently. Nolan and Comeaux pleaded not guilty and a jury trial followed. Both were found guilty by the jury and were respectively sentenced to four and three years for each count, such terms to run concurrently. Nolan was also fined $10,000.00.

Before their trial, appellants filed motions at three different times seeking discovery and inspection of all documents or tangible objects in the hands of the government, including any electronic or mechanical recordings. One such motion was withdrawn by appellants because of the government's assertion that it had no unlawfully obtained evidence in connection with this case. The other two motions were denied, the trial judge reserving to appellants the right to have a hearing on the admissibility of certain evidence after the trial. A motion to suppress the use by the government as evidence any and all documents or tangible objects obtained as a direct result of illegal wiretaps or electronic surveillance was granted.

I.

Appellants' first specification of error requires a determination of when an examination and a hearing regarding the admissibility of allegedly illegally obtained wiretap evidence must occur. The recent case of *Alderman v. United States*, 394 U. S. 165 (1965), is relied upon by appellants to support their contention that they were denied a fair trial when certain tape recordings were not turned over to them until after the trial.

Analysis of the Alderman case convinces us that appellants' reliance is misplaced. That case held that surveillance records as to which any party has standing to object should be turned over to him without being screened *in camera* by the trial judge. The rationale for such holding was that

> "Admittedly, there may be much learned from an electronic surveillance which ultimately contributes nothing to probative evidence. But winnowing this material from those items which might have made a substantial contribution to the case against a petitioner is a task which should not be entrusted wholly to the court in the first instance. It might be otherwise if the trial judge had only to place the transcript or other record of the surveillance alongside the record evidence and compare the two for textual or substantive similarities. Even that assignment would be difficult enough for the trial judge to perform unaided. But a good deal more is involved. An apparently in-

> nocent phrase, a chance remark, a reference to what appears to be a neutral person or event, the identity of a caller or the individual on the other end of a telephone, or even the manner of speaking or using words may have special significance to one who knows the more intimate facts of an accused's life. And yet that information may be wholly colorless and devoid of meaning to one less well acquainted with all relevant circumstances. Unavoidably, this is a matter of judgment, but in our view the task is too complex, and the margin for error too great, to rely wholly on the *in camera* judgment of the trial court to identify those records which might have contributed to the Government's case."

In the immediate case, the trial judge made no *in camera* inspection of the records before trial. Nor did the trial court deny the fact that defendants had a right to examine illegally obtained wiretap evidence, but simply determined that such examination should not take place until after trial. This determination was based upon the facts that the recordings in dispute comprised 42 reels of tape with over 90 hours of listening time, that the government had advised the court that there was no connection between the information contained on the tapes and evidence which they had used in their investigation or would use at the trial, and that a hearing on the purity of the government's testimony could well take more time than the trial itself.

There is nothing in the Alderman case which would lead us to conclude that there was an abuse of discretion or error on the part of the trial court when it determined that the examination and hearing should follow, rather than precede, the trial. Indeed, the Alderman case itself was remanded for a post-trial hearing. If it were true, as claimed by appellants, that Alderman expanded the rights of discovery as set out in *Dennis v. United States*, 384 U. S. 855 (1966), it would seem reasonable that the Supreme Court would have remanded the case for a new trial in lieu of remanding it for a post-trial hearing.

Although decided before the Alderman case, the reasoning of the District Court in the case of the *United States v. Birrell*, 269 F. Supp. 716 (S.D. N.Y. 1967); aff'd 399 F. 2d 343 (2nd Cir., 1968); rev'd on other grounds, 400 F. 2d 93 (2nd Cir., 1968), is particularly applicable to the present case.

> "In the Court's view, the question of the timing of a hearing on the issue of taint falls within the well-established range of judicial discretion entrusted to federal judges in ruling upon preliminary questions of fact ... there are occasions when circumstances demand a separate hearing before or after trial ... In the exercise of the Court's discretion, the primary desideratum should be the common interest of the Court and the litigants in a fair and expeditious trial." 269 F. Supp. at 726.

It cannot be claimed that any rights were prejudiced by the holding of a post-trial, in lieu of a pre-trial hearing. As the trial judge below observed,

> "...if there is an acquittal, of course, then the question is moot and we don't have any worry; and everybody's rights have been preserved. If there is a conviction, then a hearing is held ... to determine whether or not the Government's assertion is correct. If ... correct, then, of course, everybody's rights have been preserved by letting the conviction stand. If ... not correct, then, of course, everybody's rights have been preserved by the Court reversing the conviction."

II.

Appellants' next contention on appeal is that the government, in the post-trial hearing, did not satisfy its burden of establishing the lack of wiretap or electronic eavesdrop taint. For a determination upon this issue, we can again turn to the Alderman case. Justice White relying upon *Nardone v. United States*, 308 U. S. 338 (1939), stated that when an illegal search has come to light, the United States has the ultimate burden of persuasion to show that its evidence is untainted. But, at the same time, the accused must "prove that a substantial portion of the case against him was a fruit of the poisonous tree." 394 U. S. at 183. This is where appellants' contention fails.

A review of the record of the post-trial hearing discloses that at no time did appellants show the court that information contained in the tape recordings was used against them in any manner, either in the prosecution of the case during the trial or in the pretrial investigation. Appellants never even attempted to

point out to the court just what portions of the tapes tainted the government's case. On the other hand, a United States Attorney and a special agent of the Federal Bureau of Investigation, both involved in the investigation and prosecution of the case against appellants, testified under oath that the recordings played no part in the investgiation of the case or preparation for trial. After the court below carefully studied the ninety-two hours of tape recordings, it concluded that there was not "one scintilla of evidence in those tapes that could have in any way tainted the evidence produced by the Government during the trial of this case."

In light of the testimony adduced at the post-trial hearing on behalf of the government, as well as the lack of any showing whatsoever on appellants' part that a portion of the case against them was "a fruit of the poisonous tree," we are convinced that the trial court, having itself studied the recordings, did not err in its finding as to lack of taint.

III.

Appellants' third point of error relating to the failure to give instructions to the jury regarding the defense of entrapment has no merit. The basis for the appellant's claim of entrapment is that one of the former football players, who had had several telephone conversations with Græziano, was cooperating with the FBI and permitted FBI agents to listen in on some of these conversations. There was no showing of any activity which could even remotely fall within the traditional definitions of entrapment. See *Sorrells v.*

United States, 287 U. S. 435, 451 (1932) and *Hamilton v. United States*, 221 F. 2d 611, 614 (5th Cir. 1955).

It is interesting to note also that defense counsel made no reference to the defense of entrapment in his closing statement to the jury. Furthermore, appellants did not request a charge on entrapment nor did they object to the court's charge to the jury upon grounds of omitting such an instruction on entrapment. Rule 30 of the Federal Rules of Criminal Procedure provides in part that

> "no party may assign as error any portion of the charge or omission therefrom unless he objects thereto before the jury retires to consider its verdict, stating distinctly the matter to which he objects and the ground of his objection."

While this Court may, of course, notice errors to which no exception has been taken if the errors are prejudicial[1] or otherwise affect the integrity of judicial proceedings, *Tomley v. United States*, 250 F. 2d 549, 551 (5th Cir., 1958), we are convinced that no such situation is presented here.

Upon a review of the entire record, we are satisfied that the appellants received a fair trial, and the judgments appealed from are therefore

AFFIRMED.

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[1]Rule 52(b) provides that "Plain errors or defects affecting substantial rights may be noticed although they were not brought to the attention of the court."

APPENDIX B

IN THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 27241

UNITED STATES OF AMERICA,
Plaintiff-Appellee,
versus

JOSEPH LEE NOLAN a/k/a "JO JO" NOLAN, and SAMUEL F. COMEAUX a/k/a "FREDDIE" COMEAUX,
Defendants-Appellants.

Appeal from the United States District Court for the Eastern District of Louisiana

(April 20, 1970)

ON PETITION FOR REHEARING

Before GOLDBERG, DYER and CARSWELL, Circuit Judges.

PER CURIAM: IT IS ORDERED that the petition for rehearing filed in the above entitled and numbered cause be and the same is hereby **DENIED.**

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

October Term, 1969

No. 27241

D. C. Docket No. Cr. 1686

UNITED STATES OF AMERICA,
Plaintiff-Appellee,
versus

JOSEPH LEE NOLAN a/k/a "JO JO" NOLAN, and SAMUEL F. COMEAUX a/k/a "FREDDIE" COMEAUX,
Defendants-Appellants.

Appeal from the United States District Court for the Eastern District of Louisiana.

Before GOLDBERG, DYER and CARSWELL,
Circuit Judges.

JUDGMENT

This cause came on to be heard on the transcript of the record from the United States District Court for

the Eastern District of Louisiana, and was argued by counsel;

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be, and the same is hereby, affirmed.

Issued as Mandate: December 29, 1969